

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ELIZABETH M. RULISON,

Plaintiff,

V.

YOGURT PLAY, LLC d/b/a PEAKS  
FROZEN YOGURT BAR and THOMAS  
LENZ.

## Defendants.

Case No. C13-0454RSL

## ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

## I. INTRODUCTION

This matter comes before the Court on defendants' "Motion for Partial Summary Judgment" (Dkt. #31) pursuant to Fed. R. Civ. P. (Rule) 56.<sup>1</sup> Defendants assert that plaintiff cannot establish the numerosity factor required for liability under Title VII. Motion (Dkt. #31) at 1. In her response, plaintiff moves to strike the declaration of Karen Kalzer and for leave to amend her complaint. Response (Dkt. #38) at 2, 5.

The Court has reviewed the parties' submissions. For the reasons discussed below, the Court GRANTS plaintiff's motion to strike the declaration of Karen Kalzer, GRANTS defendants' motion for partial summary judgment, and GRANTS plaintiff's motion for leave to

<sup>1</sup>Contrary to the requirements of Local Civil Rule 10(e)(9), defendants supplied a courtesy copy of their motion which was not printed from PACER and is not identical to the filed copy. The Court has considered the motion as filed in CM/ECF.

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1 amend.

## 2 **II. DISCUSSION**

### 3 **A. Background**

4 Plaintiff was employed by defendant Peaks Frozen Yogurt Bar (Peaks) from January to  
 5 June 2012. Amended Complaint (Dkt. #30) at 3. Plaintiff alleges that her manager, defendant  
 6 Thomas Lenz, made overt sexual comments and committed sexually offensive actions against  
 7 her throughout the course of her employment. Id. Plaintiff eventually ceased working at Peaks  
 8 due to the alleged harassment. Id. at 5.

### 9 **B. Motion to Strike**

10 Plaintiff has moved to strike defendants' declaration of Karen Kalzer pursuant to Local  
 11 Civil Rule 7(g). Response (Dkt. #38) at 2. This motion is GRANTED. The declarant is  
 12 defendants' counsel of record and states only that “[t]he facts set forth in the foregoing motion  
 13 are true and correct.” See Motion (Dkt. #31) at 6. Statements regarding the parties' contentions  
 14 in this matter need no support other than an appropriate citation to the record. Ms. Kalzer has no  
 15 personal knowledge of the underlying facts and cannot attest thereto.

### 16 **C. Summary Judgment**

17 Summary judgment is appropriate if, viewing the evidence in the light most favorable to  
 18 the nonmoving party, “the movant shows that there is no genuine dispute as to any material fact  
 19 and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); see L.A.  
 20 Printex Indus., Inc. v. Aeropostale, Inc. 676 F.3d 841, 846 (9th Cir. 2012). The moving party  
 21 “bears the initial responsibility of informing the district court of the basis for its motion.”  
 22 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The moving party need not “produce  
 23 evidence showing the absence of a genuine issue of material fact” but instead may discharge its  
 24 burden under Rule 56 by “pointing out ... that there is an absence of evidence to support the  
 25 nonmoving party's case.” Id. at 325. “An issue is ‘genuine’ only if there is a sufficient  
 26 evidentiary basis on which a reasonable fact finder could find for the nonmoving party.” In re

1 Barboza, 545 F.3d 702, 707 (9th Cir. 2008) (internal citations omitted). “The mere existence of a  
 2 scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be  
 3 evidence on which the jury could reasonably find for the plaintiff.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

5 Defendants assert that summary judgment is appropriate on plaintiff’s Title VII claims as  
 6 Peaks does not meet the statutory definition of an employer. Motion (Dkt. #31) at 4. “The term  
 7 ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more  
 8 employees for each working day in each of twenty or more calendar weeks in the current or  
 9 preceding calendar year.” 41 U.S.C. § 2000e(b).

10 Defendants submitted into evidence Peaks’ payroll summaries for the time period of  
 11 plaintiff’s employment. Tarcea Decl. (Dkt. #32) at 2. Defendants assert that these documents  
 12 demonstrate that Peaks had a maximum of thirteen employees during the relevant time period  
 13 under 42 U.S.C. § 2000e(b). Motion (Dkt. #31) at 4-5. In response, plaintiff has submitted an  
 14 email from the Equal Employment Opportunity Commission (EEOC) confirming that Peaks  
 15 employed 15 or more persons, Parker Decl. (Dkt. #39) Ex. A, and the Notice of Right to Sue  
 16 from the EEOC. Id. Ex. B. Plaintiff also argues that Peaks has more than fifteen employees  
 17 based on the information submitted in the Declaration of Bobby Tarcea. Response (Dkt. #38)  
 18 at 5.

19 The email notifying plaintiff that Peaks employed fifteen or more persons is hearsay.  
 20 Hearsay includes any out-of-court statement offered in evidence to prove the truth of the matter  
 21 asserted. FRE 801(a), (c). Hearsay is inadmissible unless it falls within a hearsay exception  
 22 under FRE 803, 804, or 807. Plaintiff has not identified an applicable exception that would make  
 23 the EEOC email admissible. The Court therefore finds the EEOC email to be inadmissible.

24 Plaintiff’s Notice of Right to Sue is per se admissible. See Plummer v. Western Int’l  
 25 Hotels Co., 656 F.2d 502, 505 (9th Cir. 1981). “The fact that a determination from the EEOC is  
 26 highly probative, however, does not support . . . the contention that an EEOC determination

1 letter is somehow a free pass through summary judgment.” Mondero v. Salt River Project, 400  
 2 F.3d 1207, 1215 (9th Cir. 2005). Such EEOC letters “only report ‘bare conclusions,’ they have  
 3 little probative value.” Coleman v. Quaker Oats Co., 232 F.3d 1271, 1284 (9th Cir. 2000)  
 4 (internal citation omitted). The EEOC Notice here does not contain an express finding that Peaks  
 5 employed at least fifteen people, much less report “what facts the EEOC considered and how it  
 6 analyzed them” Id. It is therefore insufficient to raise a genuine issue of material fact as to the  
 7 number of Peaks employees during the relevant time period.

8 Plaintiff’s argument that Peaks had fifteen or more employees also fails. Plaintiff notes  
 9 that “[e]xhibit ‘A’ to the declaration of Bobby Tarcea does not include Tarcea nor any of the  
 10 company’s partners as Peaks’ employees but lists 16 names . . . .” Response (Dkt. #38) at 5. She  
 11 concludes by listing a total of more than eighteen employees. Id. This is an incorrect application  
 12 of § 2000e, which defines an employee as “an individual employed by an employer.” 42 U.S.C.  
 13 § 2000e(f). This means that the Peaks’ ownership partners do not count as “employees” under  
 14 § 2000e(b). Plaintiff claims that defendants’ declaration “lists 16 names without a clear  
 15 statement as to when they were employed.” Response (Dkt. #38) at 5. As the declaration consists  
 16 entirely of payroll summaries however, it is relatively simple to calculate how many employees  
 17 were working for Peaks during a given week. See Tarcea Decl. (Dkt. #32) at 2. The maximum  
 18 number of Peaks employees was thirteen on November 4, 2011. See id. Ex. A. at 17-21. The  
 19 Court finds that defendants’ evidence does not give rise to a reasonable inference that Peaks  
 20 employed fifteen or more persons during the relevant time period.

21 Plaintiff has failed to provide more than a scintilla of evidence that Peaks is an employer  
 22 subject to Title VII. Defendants’ motion for partial summary judgment on plaintiff’s Title VII  
 23 claims are GRANTED.

24 **C. Motion for Leave to Amend Complaint**

25 Plaintiff has moved for leave to amend her complaint pursuant to Rule 15(a). Response  
 26 (Dkt. #38) at 5. Plaintiff wishes to add a claim under the Fair Labor Standards Act (FLSA) as her

1 fifth cause of action. See Parker Decl. (Dkt. #39) Ex. D at 10; Response (Dkt. #38) at 5-6. Under  
 2 Rule 15(a)(2), “a party may amend its pleading only with . . . the court’s leave. The court should  
 3 freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). The Court must heed this  
 4 mandate barring a showing of “undue delay, bad faith or dilatory motive on the part of the  
 5 movant, repeated failure to cure deficiencies by amendments previously allowed, undue  
 6 prejudice to the opposing party, [or] futility of amendment.” Foman v. Davis, 371 U.S. 178, 182  
 7 (1962). Defendants have not opposed the motion, and none of the Foman factors is apparent  
 8 from the record. As plaintiff only requests “an additional federal remedy for her overtime  
 9 claim,” Response (Dkt. #38) at 6, the Court GRANTS plaintiff’s motion for leave to amend her  
 10 complaint.<sup>2</sup>

### 11 III. CONCLUSION

12 For all the foregoing reasons, plaintiff’s motion to strike is GRANTED (Dkt. #38),  
 13 defendants’ motion for partial summary judgment is GRANTED (Dkt. #31), and plaintiff’s  
 14 motion for leave to amend her complaint is GRANTED (Dkt. #38). The Clerk of the Court is  
 15 directed to docket the proposed “Second Amended Complaint for Damages” that was filed as  
 16 Exhibit D to the Declaration of Darryl Parker (Dkt. #39). The filing of the “Second Amended  
 17 Complaint for Damages” does not reinstate plaintiff’s Title VII claims.

18 Dated this 5th day of March, 2014.

19  
 20 

21 Robert S. Lasnik  
 22 United States District Judge

23 <sup>2</sup>If, as appears to be the case, plaintiff’s primary motivation behind moving for leave to amend  
 24 her complaint was to maintain federal jurisdiction should the Court grant defendants’ motion for partial  
 25 summary judgment, the amendment is unnecessary. The Court will exercise supplemental jurisdiction  
 26 over plaintiff’s remaining state law claims despite the dismissal of the Title VII claims. The Court  
 therefore advises plaintiff to review her FLSA cause of action to determine whether the claim has merit  
 or is merely being utilized as a vehicle to remain in federal court.